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No. 93-639

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SILVIA S. IBANEZ,
Petitioner,
v.
STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,
Respondent.

On Writ of Certiorari to the District Court of Appeal of Florida for the First District

BRIEF AMICUS CURIAE OF THE ALLIANCE OF PRACTICING CERTIFIED PUBLIC ACCOUNTANTS, THE INTERNATIONAL ASSOCIATION FOR FINANCIAL PLANNING, IDS FINANCIAL SERVICES INC., AND H.D. VEST FINANCIAL SERVICES IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI	1
STATEMENT	3
A. The Facts	4
B. The Proceedings Against Mrs. Ibanez	6
1. The Charges Against Mrs. Ibanez	6
2. Proceedings Before the Hearing Officer	7
3. The Hearing Officer's Decision	10
4. The Board of Accountancy's Decision	11
C. Judicial Review	13
SUMMARY OF ARGUMENT	13
ARGUMENT	17
I. COMMERCIAL SPEECH BY PROFESSIONALS ABOUT THEIR QUALIFICATIONS AND EXPERIENCE DESERVES SUBSTANTIAL FIRST AMENDMENT PROTECTION, AND CANNOT BE PROHIBITED UNLESS THE STATE PROVES THAT THE PROHIBITION MATERIALLY ADVANCES A SUBSTANTIAL STATE INTEREST AND IS NARROWLY TAILORED	17
A. Advertising of Professional Certification Receives Substantial First Amendment Protection	17
B. Because Commercial Speech Makes An Important Contribution To Public Welfare, Government Must Make A Substantial Showing To Justify Regulation	18

TABLE OF CONTENTS—Continued

Page

II. THE FIRST AMENDMENT PROHIBITS THE STATE OF FLORIDA FROM PUNISHING MRS. IBANEZ FOR USING THE CPA DESIGNATION 19

A. Mrs. Ibanez's Use of the CPA Designation Was Not Misleading 19

B. The State's Decision to Prohibit Mrs. Ibanez From Using the CPA Designation Does Not Materially Advance Any Substantial State Interest 20

C. The Absolute Prohibition on Mrs. Ibanez Using the CPA Credential Is Not A Narrowly Tailored Means of Advancing the State's Objectives 25

III. THE FIRST AMENDMENT PROHIBITS THE STATE OF FLORIDA FROM PUNISHING MRS. IBANEZ FOR USING THE CFP DESIGNATION 26

CONCLUSION 27

TABLE OF AUTHORITIES

Cases Page

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 14, 19, 25

Board of Trustees of S.U.N.Y. v. Fox, 492 U.S. 469 (1989) 18

Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980) 14, 18

City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993) 17, 18

Edenfield v. Fane, 113 S. Ct. 1792 (1993) ..... *passim*

In re R.M.J., 455 U.S. 191 (1982) 16, 19, 25, 26

Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 496 U.S. 91 (1990) ..... *passim*

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) 16, 18, 25

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 24

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985) 16, 19, 25

Statutes

Fla. Admin. Code Rules 21A-20.012 and 21A-24.001(1) 6, 16, 26

Fla. Stat. Ann. § 304 ..... 22, 23

Fla. Stat. Ann. § 473.309 7

Fla. Stat. Ann. § 473.323 ..... *passim*

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INTEREST OF AMICI

The Alliance of Practicing Certified Public Accountants (APCPA) is an organization with more than 2,000 members, and represents the interests of local CPA practitioners who are not affiliated with large national accounting firms. APCPA seeks to change rules and regulations that control the ways practicing CPAs market and charge for their services. Such regulation, in APCPA's view, tends to advantage large national accounting firms at the

expense of the local practitioner, and needlessly deprives consumers of valuable information about the services available to them, as well as flexible options for obtaining those services.

The International Association for Financial Planning (IAFP) was founded in 1969 and has 11,500 members. It is the oldest and largest membership association of its kind for those who provide financial planning services. IAFP provides members with educational and training opportunities. IAFP also develops and enforces ethical standards for financial planners, which are embodied in the IAFP Code of Professional Ethics.

IDS Financial Services Inc. (IDS) is a subsidiary of American Express company and has its principal place of business in Minneapolis, Minnesota. Through its Tax and Business Services division, IDS offers tax planning and bookkeeping services to small and medium size businesses throughout the country. Although IDS is not itself a "CPA firm" in that it is not owned entirely by CPAs, IDS does employ CPAs in its local offices throughout the country to provide these services to its business clients.

H.D. Vest Financial Services is a financial services corporation for tax professionals, and has its principal place of business in Irving, Texas. H.D. Vest does not itself provide accounting or financial planning services to the public. H.D. Vest offers financial products to the public through its local representatives, many of whom are CPAs and CFPs.

These *amici* are vitally interested in the removal of unconstitutional restraints on the ability of certified public accountants and certified financial planners to inform the public of their credentials. The restrictions at issue in this case are typical of those that a number of States impose on CPAs who seek to offer tax or financial planning services in settings other than the traditional CPA firm, such as law firms, business services firms, or financial planning firms. In the view of these *amici,* such restrictions, though purportedly consumer protection measures, are in fact profoundly anti-consumer because they deprive the public of truthful, readily verifiable information about the experience, training and qualifications of thousands of CPAs and CFPs who are offering tax or financial planning services but are not part of traditional CPA firms.[1]

STATEMENT

By its own admission, the Florida Board of Accountancy disciplined Petitioner Silvia S. Ibanez for truthfully identifying herself as a certified public accountant (CPA) and certified financial planner (CFP) on her business card and in the yellow pages. The parties apparently disagreed as to whether state law authorized the Board to do so, but that dispute is over. The Florida Board of Accountancy has *in fact* disciplined Mrs. Ibanez because she advertised her CPA and CFP designations while practicing law, and the Florida courts have affirmed the Board. As it comes to this Court, therefore, the case poses a straightforward question: did the Board's action violate the First Amendment?

To answer that question, this Court must determine whether the Board has proven that Mrs. Ibanez's use of the CPA and CFP designations "was misleading and, even if it was not, whether the potentially misleading character of such statements creates a state interest sufficiently substantial to justify a categorical ban on their use." *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois,* 496 U.S. 91, 100 (1990) (plurality opinion); *id.* at 112 (concurring opinion). As will be demonstrated, the Board cannot possibly meet this standard.

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[1] The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of this Court.

A. The Facts

Silvia S. Ibanez is a practicing attorney and member in good standing of the Florida bar. She holds an active CPA license in good standing, and complies with Florida's technical, ethical and continuing education requirements for CPAs. She is a registered investment advisor with the Securities and Exchange Commission and with the Florida Division of Securities, and meets all requirements imposed by those regulatory authorities. She is certified as a specialist in financial planning by the International Board of Standards and Practices for Certified Financial Planners, Inc. (IBCFP), and thus has the right to use the CFP registered trademark. *See* Recommended Order of Hearing Officer, Findings of Fact ¶¶ 1, 2.[2]

Mrs. Ibanez offers professional services to the public through her law firm. She has adopted the "professional association" mode of corporate organization, but is a sole practitioner. Her legal practice focuses on tax and estate planning services. She provides tax opinions, represents clients before the Internal Revenue Service, and evaluates the tax consequences of proposed transactions. Mrs. Ibanez also provides financial planning and advice to her clients. Findings ¶ 11; Pet. App. 27a. Her practice does not involve services reserved exclusively to accountants under Florida law—the so-called audit and attest functions. *See generally Edenfield v. Fane*, 113 S. Ct. 1792, 1799 (1993) (in audit and attest function, CPA "reviews financial statements and attests that they have been prepared in accordance with generally accepted accounting principles and present a fair and accurate picture of the firm's financial condition)."[3] Nor does she

[2] All citations in this section of the Statement are to factual findings in the Hearing Officer's order that were affirmed by the Florida Board of Accountancy, and thus must be taken as established for purposes of this case.

[3] Section 473.322(c) of the Florida Accountancy Act prohibits any person not holding an active CPA license from performing the audit or attest function. But this provision does "not prevent the performance by persons other than certified public accountants of other services involving the use of accounting skills, including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon." Fla. Stat. Ann. § 473.322(c). Thus, the only function reserved exclusively to CPAs in Florida is the audit and attest function.

provide bookkeeping or payroll services to clients. She does use her knowledge of accounting and financial planning in performing tax and estate planning services for clients in her law practice. Findings ¶ 11; Pet. App. 27a. There is no disagreement in this case that a licensed attorney may also hold a CPA license, and that CPAs may legally provide all the services Mrs. Ibanez provides in the context of a law practice. Findings ¶ 12; Pet. App. 28a.

Mrs. Ibanez is listed in the yellow pages under the "Attorney" heading, but no other. Findings ¶¶ 7-8; Pet. App. 26a-27a. Her listing discloses the truthful fact that she is a CPA and a CFP. Mrs. Ibanez also uses the CPA and CFP designations on her business cards and letterhead. This information is valuable to prospective clients because it permits them to make informed decisions respecting whom they wish to engage to perform tax and estate planning services. Indeed, her CPA certificate expressly authorizes her to "append the letters CPA after [her] name to evidence registration . . . . as a Certified Public Accountant." Findings ¶ 4; Pet. App. 26a.

Mrs. Ibanez is, in many respects, representative of an accelerating trend in the provision of professional services. Although traditionally most CPA services involved the audit and attest function, non-attest work as a percentage of total CPA services has grown dramatically in recent decades. The majority of CPAs today do not perform the traditional audit and attest function reserved by law to those holding a CPA license. Most CPAs use their skills in the provision of tax services, business services or financial planning—services not reserved exclu-

sively to CPAs by law. Indeed, fewer than half of those who hold CPA licenses in Florida are engaged in the traditional practice of accounting.[4] Tens of thousands of individuals now hold multiple credentials, and make use of their accounting skills in offering legal advice, financial planning or business services.

B. The Proceedings Against Mrs. Ibanez

1. *The Charges Against Mrs. Ibanez*

The Florida Department of Professional Regulation (DPR), which encompasses the Board of Accountancy, filed an administrative complaint against Mrs. Ibanez in 1991. The complaint was initiated by the Board itself, and not as the result of any allegations by a consumer. The complaint alleged violations of Fla. Stat. Ann. §§ 473.323(1)(a), (f), (g) and (h), and Fla. Admin. Code Rules 21A-20.012 and 21A-24.001(1).[5] Section 473.323(1)(a) authorizes disciplinary action for violations of any provision of the Accountancy Act regulating CPAs. Section 473.323(1)(f) prohibits "fraudulent, false, deceptive or misleading" advertising. Sections 473.323(1)(g) prohibits "fraud, deceit . . . negligence, incompetency or misconduct, in the practice of public accounting." Section 473.323(1)(h) authorizes disciplinary action for violation of any rule established under authority of the Accountancy Act. Rule 21A-20.012 defines "holding out" for purposes of the Accountancy Act, but does not itself impose any substantive restrictions. Rule 21A-24.001(1) defines and restricts certain forms of advertising, including specialty designations and claims of certification.

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[4] *See* Memorandum of Florida Institute of Certified Public Accountants (April 16, 1991). This memorandum is a matter of record in *Ibanez v. Board of Accountancy*, DOAH Case No. 91-3336R, a companion to the instant proceeding. *See* Pet. App. 24a. The record in the companion proceeding was incorporated into the record of this proceeding. Pet. App. 24a-25a.

[5] The Rules are now codified at Fla. Admin. Code § 61H1-20.012 and § 61H1-24.001(1).

DPR's original complaint contained three counts. The first alleged that Mrs. Ibanez was subject to discipline under 473.323(1)(a) because, by using the CPA designation, she was "practicing public accounting", and was not practicing within a licensed CPA firm. Pet. App. 46a. In particular, the Board alleged that Mrs. Ibanez's "affiliation" with her solo law practice triggered this prohibition. The second count alleged that Mrs. Ibanez violated Sections 473.323(1)(g) and (h), as well as Rule 21A-24.001(1)(g), by using the CFP designation. Pet. App. 46a-47a. The third count alleged that Mrs. Ibanez violated 473.323(1)(f) and (h), as well as Rule 21A-24.001, because her use of the CPA designation was inherently misleading. *See* Pet. App. 45a-47a.

Prior to the evidentiary hearing before a hearing officer, DPR withdrew all allegations that Mrs. Ibanez violated Sections 473.309 and 473.3101 by practicing public accounting while affiliated with an unlicensed firm. Pet. App. 46a. According to the Hearing Officer, "[d]ue to DPR's withdrawal of the charges . . . specifically citing Sections 473.309 and 473.3101 . . . it must be concluded that Ibanez could not be held in this proceeding to have violated those statutory provisions." Pet. App. 46a.

Thus, as framed for the proceedings before the Hearing Officer, the case against Mrs. Ibanez consisted entirely of allegations that her use of the CPA and CFP designations was misleading.

2. *Proceedings Before the Hearing Officer*

At the evidentiary hearing, DPR introduced three exexhibits and the brief testimony of three witnesses. The first exhibit was Mrs. Ibanez's business card, the second was a composite of several Board of Accountancy opinion

letters relating to the CFP designation, and the third was a copy of Mrs. Ibanez's CPA certificate.[6]

The first witness, Mr. Robert Dooner, was asked to examine Mrs. Ibanez's business card. Based solely on that examination, Dooner testified that Mrs. Ibanez "is telling the public that she is available and offering to perform services that CPAs normally perform." Disciplinary Hearing Transcript (H. Tr.) at 17.[7] On cross-examination, Mr. Dooner admitted that he was unaware of any empirical data about what views consumers form when they see CPA on a business card, or whether they are misled in any way when attorneys include the CPA designation in listings of professional credentials. (H. Tr. at 20-21).

The second witness, Ms. Elise Rice, purported to testify as a representative of the "uninformed public," and stated that Mrs. Ibanez's business card confused her as to whether Mrs. Ibanez's law firm provided legal services or accounting services. Ms. Rice was a DPR employee. The Hearing Officer found her testimony unworthy of belief. Pet. App. 30a.

The third witness was the executive director of the Board of Accountancy, Mrs. Martha Willis. She testified that Mrs. Ibanez's use of the CFP designation constituted advertising of a particular "specialty" in accounting. According to Mrs. Willis, this "specialty" designation violated Rule 21A-24.001(1)(g) because the Board had not expressly approved CFP as a specialty designation.

[6] The Board found that Mrs. Ibanez's yellow pages listing was one instance of misleading speech. The yellow pages listing was not, however, introduced by the Board at the evidentiary hearing.

[7] Mr. Dooner was also the expert for the Board in *Edenfield v. Fane*. This Court concluded that his testimony in *Fane* contained "nothing more than a series of conclusory statements that add little if anything to the Board's original statement of its justifications." 113 S. Ct. 1792, 1801 (1993).

On cross-examination, she admitted that she did not know whether Mrs. Ibanez "misleads anybody" by holding out as a CFP. (H. Tr. at 43). She also admitted that she was unaware of any empirical evidence that use of the CFP designation misleads consumers in any way. (H. Tr. at 42-43).

The Board produced no evidence that Mrs. Ibanez's claims of CPA and CFP certification were anything other than an accurate reflection of her education, training and qualifications in accounting and financial planning. The Board produced no evidence indicating that anyone had actually been misled or confused by Mrs. Ibanez's use of the CPA or CFP credential. The Board produced no empirical studies or other evidence indicating that the public is confused or misled in any way when attorneys use the CPA designation. The Board produced no studies or empirical evidence that the public is misled or confused in any way by the CFP designation, even when it is used in conjunction with the CPA designation. As counsel for the Board argued, "the whole case boils down to the use of the CPA, CFP designations. . . . The advertising rule, specifically, says that if you use it that is *in and of itself* misleading and deceptive." (H. Tr. at 49) (emphasis added).

Mr. Robert Goss testified for Mrs. Ibanez. Mr. Goss is President of the International Board of Standards and Practices for Certified Financial Planners, Inc. (IBCFP). Goss testified that the CFP designation was owned by IBCFP and had protected status under federal trademark law, and that IBCFP vigorously policed use of the CFP designation. His testimony set forth in detail the rigorous requirements for attaining the CFP designation.[8]

Mrs. Ibanez testified in her own defense. She testified that she was a licensed CPA and CFP in good standing,

[8] Those requirements are set forth in the Brief Amicus Curiae of the International Board of Standards and Practices for Certified Financial Planners, filed in support of the petition for certiorari.

and that she performed no audit or attest work. Mrs. Ibanez also testified that she did not believe she was "holding out" as a CPA because she was not providing a full-service accounting practice, but merely sought to inform potential legal clients that she had additional knowledge and training in accounting and financial matters that might be relevant to their decision whether to employ her for tax or estate planning services. Because she was not "holding out" as a CPA, she argued that she was not "practicing public accounting" within the meaning of Section 473.323 (H. Tr. 67-99), and therefore not subject to sanction by the Board for her use of the CPA credential.

3. *The Hearing Officer's Decision*

The Hearing Officer reached two legal conclusions. First, the Hearing Officer concluded that Mrs. Ibanez had not violated the prohibition against engaging in misleading conduct while "practicing public accounting." According to the Hearing Officer, Mrs. Ibanez was not "holding out" to the public as a person practicing public accounting, but was merely informing potential legal clients of additional qualifications to perform certain legal services, such as tax preparation or estate planning. *See* Findings ¶ 21; App. 31a. Because the prohibition of misleading advertising applied only to those "practicing public accounting," the Hearing Officer concluded that DPR was without authority to proceed against Mrs. Ibanez on this ground.

Second, the Hearing Officer concluded that the Board could not constitutionally punish Mrs. Ibanez for using her CPA and CFP credentials—even if she were "practicing public accounting." The Hearing Officer found nothing misleading about Mrs. Ibanez's use of either credential. In particular, the Hearing Officer found that DPR "presented no evidence by way of anecdotal experience, professional studies, or accumulated data to show

that licensed CPAs or certified CFPs have ever mislead [sic] anyone by displaying their credentials in the manner Ibanez has done here." Findings ¶ 25; Pet. App. 32a. The Hearing Officer also found that there was no "evidence that any member of public has ever been confused about whether or not Ibanez was practicing accounting or law or financial planning or that any member of the public was mislead [sic] into hiring Ibanez under the impression that she would be acting as a CPA solely, and not as an attorney, or that she would be performing audits or performing the attesting function of a CPA." Findings ¶ 26; Pet. App. 32a.

4. *The Board of Accountancy's Decision*

The Board of Accountancy accepted almost all the Hearing Officer's factual findings (including ¶¶ 25 and 26), but reversed the Hearing Officer's legal conclusions. The Board specifically rejected the Hearing Officer's interpretation of "practicing public accounting." In the Board's view, any licensed CPA who uses the CPA designation is "practicing public accounting" and thus subject to all laws regulating public practice, even if the CPA is principally engaged in the practice of law.

The Board acknowledged that the "sole purpose" of the restrictions being enforced against Mrs. Ibanez "is to provide consumers with the knowledge that if they use a CPA's services, and those services are within the practice of public accounting, as defined in Section 473.302 (4), F.S., that a CPA will be subject to the technical, educational and other standards promulgated by the Florida legislature and the Board of Accountancy." Pet. App. 6a (emphasis added). As the Board further explained, "the function" of these provisions "is to *let the public know* that those individuals who are licensed have met, and continue to meet, the standards set out by the legislature and the appropriate regulatory boards through statutes and rules." Pet. App. 7a (emphasis added).

The Board held that Mrs. Ibanez's use of the CPA credential was inherently misleading. That holding did not rest on the claims made at the evidentiary hearing that the public would be confused over the services Mrs. Ibanez would provide. Instead, the Board concluded that Mrs. Ibanez "has, in effect, told the public that she is subject to the provisions of Chapter 473, and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not." Pet. App. 11a. Apparrently, the Board based this conclusion on the fact that Mrs. Ibanez had advanced a legal argument that she was not "practicing public accounting" within the meaning of Section 473.323, and thus not in violation of its prohibition on misleading advertising by those practicing public accounting.

The Board's opinion acknowledged that Mrs. Ibanez was in fact subject to the full panoply of statutory and regulatory requirements Florida imposes on CPAs, Pet. App. at 11a n.7, and did not explain how Mrs. Ibanez's subjective belief as to whether she was subject to laws governing the "practice of public accounting" was relevant. Nor did the Board identify any evidence to support the assertion that Mrs. Ibanez "acts as though" she is not subject to those rules. Nonetheless, the Board held that when Mrs. Ibanez holds out as a CPA she is equivalent to an unlicensed person claiming to be a CPA. Pet. App. 10a, 11a.

With respect to the CFP credential, the Board concluded that Mrs. Ibanez's commercial speech was misleading because designations implying "certification" in conjunction with the CPA designation "inherently mislead the public into believing that state approval and recognition exists." Pet. App. 20a. According to the Board, such terms are inherently misleading unless "the Board has approved . . . a form of recognition or self-designation using such terms as a Board approved specialty." Pet. App. 20a.

Based on these findings, the Board reprimanded Mrs. Ibanez. Pet. App. 20a.

C. Judicial Review

Mrs. Ibanez sought judicial review in the Florida district court of appeal. That court affirmed the Board per curiam without opinion. Pet. App. 2a. As a result, Mrs. Ibanez had no right of review in the Florida Supreme Court. She thus petitioned for certiorari. This Court granted the petition on January 14, 1994.

SUMMARY OF ARGUMENT

The central question presented is whether the Florida Board of Accountancy has advanced a constitutionally adequate defense of its decision to censure Mrs. Ibanez for making truthful and verifiable public statements that she is a CPA and CFP. The answer to that question is no.

1. "Holding out"—which includes using the CPA and CFP designations on signs, letterheads, business cards, and publications sent to clients and potential clients—is commercial speech protected by the First Amendment. *See Peel*, 496 U.S. at 101. A statement that a person holds a CPA license or CFP certificate is "a statement of objective [and] . . . verifiable fact, as are the predicate requirements for that certification." *Id.* Such information helps consumers evaluate "the way in which a particular product or service compares to its alternatives in the market." *Fane*, 113 S. Ct. at 1798. That is equally true when consumers seek legal advice that implicates tax, estate planning or other issues on which accounting and financial planning skills may be of use.

Florida's ban on holding out by CPAs such as Mrs. Ibanez thus "threatens societal interests in broad access

to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard." *Fane*, 113 S. Ct. at 1798. *See also Bates v. State Bar of Arizona*, 433 U.S. 350, 377-78 (1977). The ban can be sustained only if the state demonstrates that it materially advances a substantial state interest and is narrowly tailored to avoid undue suppression of valuable expression. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980).

2. These established principles require reversal. With respect to Mrs. Ibanez's use of the CPA designation, the Board has made no showing that it was misleading in any respect. The CPA designation is a state-conferred assurance that the certified individual is of good character, has the requisite education and training in accounting, and has passed a state-administered examination designed to ensure competence. So long as a person holds a valid CPA license, "holding out" as a CPA cannot, by definition, be even potentially misleading in the way feared by the dissenting Justices in *Peel*; there is no risk that the public will *wrongly* assume state certification because the State is in fact certifying.

Lacking any substantial argument that Mrs. Ibanez's use of the CPA designation was misleading, the Board has had to resort to a transparently implausible one. The Board asserts that Mrs. Ibanez's use of the CPA designation was misleading because she has "in effect, told the public that she is subject to the provisions of Chapter 473 . . . when she believes and acts as though she is not." Pet. App. 11a. That rationale fails for several reasons.

First, like every licensed CPA in Florida, Mrs. Ibanez is regulated by the Board. Section 473 of the Accountancy Act expressly provides that "[e]very licensee shall be governed and controlled by this act and the rules

adopted by the Board." Fla. Stat. Ann. § 473.304. Indeed, this very case arises out of a Board proceeding against Mrs. Ibanez, and the Board's opinion acknowledges that she could have been charged with violating the substantive provisions of Section 473. Pet. App. at 11a n.7. Thus, irrespective of what Mrs. Ibanez "believes," there is *no* risk—actual or potential—that members of the public will *falsely* conclude she is subject to the Board's regulatory authority. Even if members of the public make such assumptions, the assumptions will be accurate. In any event, it is not credible to argue that Mrs. Ibanez believed she was not subject to the Board's jurisdiction. She participated fully in the DPR disciplinary proceedings, and sought to defend her conduct on the merits. She simply offered an interpretation of the substantive scope of Section 473.323 different than that held by the Board.

Second, the Board made no effort to prove any material risk that the public would be confused in this way—or any other—by attorneys using their CPA designation on business cards and letterhead, and in attorney listings in the yellow pages. The Board thus has not shown that "the harms it recites are real." *Fane*, 113 S. Ct. at 1800.

Third, there is not a shred of evidence that Mrs. Ibanez "acts as though" she is not subject to the statutes and rules governing Florida CPAs. As the Hearing Officer specifically found, Mrs. Ibanez "could not be held in this proceeding to have violated" statutory provisions against CPAs affiliating with unlicensed firms. Pet. App. 46a. The Board withdrew those allegations, and introduced no evidence to support them. Nor did the Board introduce any evidence to support its present suggestion that Mrs. Ibanez accepts remuneration in forms prohibited to CPAs (such as contingent fees). *See* Pet. App. 11a.

3. These First Amendment principles also foreclose punishment of Mrs. Ibanez for using the CFP designation.

The CFP designation is not a misleading claim of specialty. CFP is widely recognized national private credential, protected by federal trademark law. Only those who meet the rigorous, comprehensive requirements of the IBCFP may call themselves CFPs. Thus, there is no substantial risk that the public will be misled into falsely assuming that those who hold out as CFP's are especially qualified to provide financial planning services. Furthermore, nothing in Florida law prohibits any person from using the designation.

Nor is there any substantial risk that the public will be confused when the CFP designation is used in conjunction with the CPA designation. This Court's decision in *Peel* establishes that claims of certification are not inherently misleading; there is simply no reason to assume that the public will invariably assume that the CFP certification is state-sponsored. Even if the CPA and CFP designations are potentially misleading when used together, that would not justify the outright ban the Board has imposed. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. 191, 203 (1982). *Accord Fane*, 113 S. Ct. at 1801-02; *Peel*, 496 U.S. at 111; *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 473-78 (1988); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 644-49 (1985); *Bates v. State Bar of Arizona*, 433 U.S. at 372-74. The risk of confusion could be completely dispelled by a disclaimer making clear that the CFP designation is not state-sponsored, or by other regulatory alternatives far less draconian than the absolute ban Florida has imposed. *See Peel*, 496 U.S. at 117; *Bates*, 433 U.S. at 375 ("the preferred remedy is more disclosure rather than less"). Indeed, the Board has such an alternative at hand. The Board generally permits claims of specialization, so long as they are accompanied by an appropriate disclaimer. *See* Rule 21A-24.001(1)(g); Fla. Admin.

Code § 61H1-24.001(1)(g). The Board made no effort to show why that general approach cannot achieve the objectives the Board seeks to achieve by an outright ban on the CFP designation.

ARGUMENT

I. COMMERCIAL SPEECH BY PROFESSIONALS ABOUT THEIR QUALIFICATIONS AND EXPERIENCE DESERVES SUBSTANTIAL FIRST AMENDMENT PROTECTION, AND CANNOT BE PROHIBITED UNLESS THE STATE PROVES THAT THE PROHIBITION MATERIALLY ADVANCES A SUBSTANTIAL STATE INTEREST AND IS NARROWLY TAILORED.

A. Advertising of Professional Certification Receives Substantial First Amendment Protection.

This Court's recent decisions in *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), and *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), strongly reaffirmed the "value of commercial speech." *Discovery Network*, 113 S. Ct. at 1511. As *Fane* makes clear, commercial speech by professionals makes an important contribution to the public welfare by increasing the ability of consumers to make informed choices about matters of importance to them. Speech about professional certification makes an especially important contribution. A claim of certification provides "reliable, verifiable evidence of petitioner's experience." *Peel*, 496 U.S. at 99. A statement that an attorney holds a CPA license is "a statement of objective [and] . . . verifiable fact, as are the predicate requirements for that certification." *Id.* at 101. Thus, "[i]nformation about certification and specialties facilitates the consumer's access to legal services" and other professional services. *Id.* at 110.

B. Because Commercial Speech Makes An Important Contribution To Public Welfare, Government Must Make A Substantial Showing To Justify Regulation.

Because Florida's ban on "holding out" restricts constitutionally protected commercial speech, it must be judged under the appropriate First Amendment standard of review. To minimize the suppression of valuable commercial information, the First Amendment requires the "government['s] goal to be substantial, and the cost to be carefully calculated" when regulating such speech. *Board of Trustees of S.U.N.Y. v. Fox*, 492 U.S. 469, 480 (1989). A State may not ban commercial speech unless it is inherently misleading, and may regulate commercial speech only if the regulation directly advances a substantial interest and is narrowly tailored to avoid infringing unreasonably on protected expression. *Fane*, 113 S. Ct. at 1801-02; *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. at 566.

Blanket bans on commercial speech are extremely disfavored. The mere opportunity for "isolated abuses or mistakes does not justify a total ban on . . . protected expression." *Shapero*, 486 U.S. at 476. Government may not suppress truthful and nondeceptive commercial speech "merely to spare itself the trouble of distinguishing such advertising from false or deceptive advertising." *Zauderer*, 471 U.S. at 646. As this Court has made clear,

> the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.

Id.

Furthermore, "[i]t is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Fane*, 113 S. Ct. at 1800; *Discovery Network*, 113 S. Ct. at 1510. As *Fane* holds:

> This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.

Fane, 113 S. Ct. at 1800.

II. THE FIRST AMENDMENT PROHIBITS THE STATE OF FLORIDA FROM PUNISHING MRS. IBANEZ FOR USING THE CPA DESIGNATION.

A. Mrs. Ibanez's Use of the CPA Designation Was Not Misleading.

Commercial speech may be banned only if it is "inherently misleading." Inherently misleading speech necessarily and irremediably deceives its audience in a material way. States must distinguish between this limited category of unprotected expression and expression that merely holds the *potential* to mislead. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203; *Fane*, 113 S. Ct. at 1800-02; *Peel*, 496 U.S. at 111; *Zauderer*, 471 U.S. at 644-49; *Bates*, 433 U.S. at 372-74.

In this case, the Florida Board of Accountancy claims that Mrs. Ibanez's use of the CPA designation is inherently misleading. But Mrs. Ibanez is in fact a licensed CPA in good standing, and the Board introduced no evidence indicating that Mrs. Ibanez's use of the CPA designation was "actually misleading." Neither the Board nor the Florida courts made "any factual finding of actual deception or misunderstanding." *See Peel*, 496 U.S. at 101. Thus, as in *Peel*, "given the complete absence of deception in the present case," this Court should "reject

the contention that petitioner's [speech] is actually misleading." *Id.* at 106.

The Board also failed to introduce any evidence—empirical, anecdotal or otherwise—showing that consumers are inherently misled *in any way* when attorneys use a CPA designation in conjunction with their legal practice. Thus, as in *Peel*, the Board's position rests entirely on the claim that Mrs. Ibanez's use of the CPA designation is inherently misleading as a matter of law. "Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question over which Members of this Court should exercise *de novo* review." *Peel*, 496 U.S. at 108.

"Holding out" as a CPA presents none of the dangers typically thought to justify state regulation of professional certification claims. When displayed by licenseholders such as Mrs. Ibanez, the CPA designation conveys accurate, objectively verifiable information about the designee's moral character, education, and accounting skill. The requirements for certification are plainly set forth in the Florida Statutes. There is thus no significant risk of consumer confusion as to what the CPA designation connotes. That is why CPAs are authorized, on the face of the CPA certificate itself, to use the CPA designation on cards, letterheads and other documents intended for prospective clients. And, in contrast to *Peel*, there is no potential risk here that the public will falsely assume the State has conferred the certification—CPA status *is* state-conferred.

B. The State's Decision to Prohibit Mrs. Ibanez From Using the CPA Designation Does Not Materially Advance Any Substantial State Interest.

Lacking any argument that Mrs. Ibanez's use of the CPA designation is actually or inherently misleading, the Board has advanced a contrived rationale. According to the Board, Mrs. Ibanez may have falsely induced consumers to believe that she is subject to Board regulation, and thus to overestimate the extent of Board supervision. Pet. App. 11a ("Respondent has, in effect, told the public that she is subject to the provisions of Chapter 473, and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not."). In the Board's view, therefore, Mrs. Ibanez's speech creates a risk that its audience will mistakenly assume the Board is regulating Mrs. Ibanez's activities. To make this point, the Board analogized Mrs. Ibanez's use of the CPA credential to use of that credential by an unlicensed person. Pet. App. 15a.

Although protecting the public from potentially misleading speech is a substantial interest "in the abstract," the Board has failed to show how the interest is implicated in any way here. *See Fane*, 113 S. Ct. at 1800. The Board produced *no* evidence showing that the CPA designation causes consumers to form any opinions as to the degree to which the CPA is subject to state regulation, much less that they will erroneously overestimate the degree of official supervision. To the contrary, all the evidence in this case indicates that the public simply understands the CPA designation as an objective indicium of education, training and experience in accounting.[9] Furthermore, Mrs. Ibanez is fully subject to the regulatory power of the Florida Bar, and to all generally

[9] Indeed, the Board's present theory departs substantially from the case the Board sought to make before the Hearing Officer. The two witnesses testifying about Mrs. Ibanez's use of the CPA designation—Robert Dooner and Elise Rice—both opined that when an attorney or law firm advertisement contains a CPA designation, the public will be confused as to whether the law firm provides accounting services, and, if, so, what types of accounting services. The Hearing Officer found this claim insupportable, and the Board did not pursue it in the decision reversing the Hearing Officer. Instead, the Board shifted to the theory that consumers would be misled about the extent to which Mrs. Ibanez is subject to the Board's regulatory jurisdiction.

applicable state laws and regulations forbidding consumer fraud and deception.[10]

The lack of evidence to support the Board's justification is hardly surprising given its inherent implausibility. If consumers assume Mrs. Ibanez is subject to the Board's regulatory oversight, they will be correct. Section 473 of the Act expressly provides that "[e]very licensee shall be governed and controlled by this act and the rules adopted by the Board." Fla. Stat. Ann. § 473.304. The Board specifically found that Mrs. Ibanez was holding out as a CPA and expressly held that the Board had regulatory authority over any CPA who holds out. In any event, Section 473.323(f) prohibits misleading advertising by any licensee, not merely those "practicing public accounting," and thus plainly applied to Mrs. Ibanez even if she were correct in her interpretation of the Accountancy Act. The Board also made clear that it could have prosecuted Mrs. Ibanez for alleged violations of substantive provisions of the Act rather than for misleading advertising. See Pet. App. 11a n.7. The Board did in fact discipline Mrs. Ibanez, thereby indisputably exercising jurisdiction over her conduct. Thus, Mrs. Ibanez cannot have *falsely* conveyed the message that she "will be regulated" by the Board. *See* Pet. App. 13a.

Nor can any other plausible justification be gleaned from the Board's opinion. In particular, the result here cannot be justified by the Board's single oblique suggestion, in a footnote, that a CPA's use of the designation may be misleading unless the CPA is actually in compliance with all "provisions of Section 473 and the rules promulgated thereto." Pet. App. 11a n.7.

That plainly is not the basis for the Board's action here because the record contains no evidence that Mrs. Ibanez has failed to comply with the substantive requirements of Section 473. Although DPR initially alleged one such

[10] The Florida Bar expressly permits attorneys to hold out as CPAs. *See* Florida Bar Ethics Opinion 88-9.

substantive violation—that Mrs. Ibanez violated 473.309 and 473.3101 by practicing public accounting while affiliated with an unlicensed firm—the allegation was expressly withdrawn prior to the administrative hearing. As the Hearing Officer concluded, "Ibanez could not be held in this proceeding to have violated those statutory provisions." Pet. App. 46a.[11] That leaves only the Board's suggestion that Mrs. Ibanez does not "forego certain forms of remuneration denied to individuals who are practicing public accountancy." Pet. App. 11a. Presumably, the Board was referring to Section 473's ban on CPAs receiving contingent fees. But the record contains absolutely no evidence that Mrs. Ibanez ever accepted such forms of remuneration.[12]

In any event, this alternative justification cannot save the Board's decision because the "substantive" provision Mrs. Ibanez allegedly violated is itself an unconstitutional restriction on commercial speech. The allegation that Mrs. Ibanez "'practiced public accounting" while affilated with an unlicensed firm is, at bottom, a claim that she violated an additional restriction on using the CPA designation. It is undisputed that CPAs may perform many types of accounting services while affiliated with unlicensed firms. Findings ¶¶ 12, 15; Pet. App. 28a. It is also undisputed that *all* of the accounting services Mrs. Ibanez provides in the course of her law practice are non-attest services that may legally be provided by CPAs in unlicensed firms. The only substantive restriction Florida

[11] The Board abandoned this contention because it is insubstantial. Florida law requires corporations or partnerships that practice public accounting to obtain a separate license, and forbids them from practicing public accounting without a license. § 473.309. A partnership or corporation is eligible to be licensed if every member of the partnership or every shareholder is a CPA. Obviously, Mrs. Ibanez's law firm meets that criterion because she is a sole practitioner. Thus, at most, Mrs. Ibanez had not yet applied for a separate partnership license to which she was clearly entitled.

[12] The Board's brief in opposition to the petition for certiorari made no mention of this argument.

imposes on CPA's who, like Mrs. Ibanez, perform these non-attest services while affiliated with unlicensed firms is that they refrain from *holding out* as CPAs.[13] Thus, when the Board alleged that Mrs. Ibanez was unlawfully "practicing public accounting" while affiliated with an unlicensed firm, that was not a claim that she had performed any *services* she could not legally perform while affiliated with an unlicensed firm. Rather, it was a claim that, in addition to performing services she *could* legally provide while affiliated with an unlicensed firm, she held out as a CPA. The "substantive" provision at issue here thus aims directly at "holding out" by CPAs affiliated with unlicensed firms.

To justify this additional restraint on the use of the CPA designation, the Board would have to demonstrate that the restraint directly advances a substantial interest in preventing misleading speech, and is narrowly tailored. The Board has not even begun to meet that additional burden with respect to the alleged "substantive" violation. Thus, the purportedly "substantive' violation on which the Board's alternative theory appears to be premised is nothing more than another indefensible restriction on commercial speech. As this Court has made clear, a State may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1986).

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[13] Mrs. Ibanez is not practicing public accounting unless, in addition to performing non-attest services, she holds out as a CPA. *See* Rule 21A-20.011(3); Fla. Admin. Code § 61H1-20.011(3). She would thus violate the prohibition on "practicing public accounting" in an unlicensed firm only if she held out as a CPA. This restriction, therefore, is not a substantive restriction on her conduct at all. It is another restriction on holding out, one that would appear to forbid CPAs affiliated with unlicensed firms from truthfully advertising their CPA status, even though they perform non-attest services.

In this case, as in *Edenfield v. Fane*, the Florida Board of Accountancy has failed to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." 113 S. Ct. at 1800. The Board's prohibition on holding out by CPAs such as Mrs. Ibanez cannot be sustained.

C. The Absolute Prohibition on Mrs. Ibanez Using the CPA Credential Is Not A Narrowly Tailored Means of Advancing the State's Objectives.

Even if Mrs. Ibanez's use of the CPA credential posed a material risk of misleading the public—and it does not—that risk could be entirely eliminated through the use of simple disclaimers. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203. *See also Fane*, 113 S. Ct. at 1800-02; *Peel*, 496 U.S. at 111; *Shapero*, 486 U.S. at 473-78; *Zauderer*, 471 U.S. at 644-49; *Bates*, 433 U.S. at 372-74.

If the problem is that Mrs. Ibanez is offering accounting services in the context of a law firm that is not independently licensed with the Board of Accountancy, a disclaimer could inform the public that Mrs. Ibanez's law firm is not independently licensed as CPA firm. If the problem is that consumers will wrongly assume that Mrs. Ibanez provides all accounting services, a simple disclaimer could easily dispel any such misconception. Thus, the State cannot impose a flat prohibition on attorneys holding out as CPAs.

III. THE FIRST AMENDMENT PROHIBITS THE STATE OF FLORIDA FROM PUNISHING MRS. IBANEZ FOR USING THE CFP DESIGNATION.

Peel establishes that the use of the word "certified" is not inherently misleading in the sense that the public will necessarily assume that certification is state-conferred. In the present case, the Board produced no evidence—empirical, documentary or testimonial—demonstrating that use of the CFP designation misleads the public in this way. Rather, the Board asserted as a matter of law that "the use, by a CPA, of any of the terms set forth in Rule 21A-24.001(1)(i) when those terms have not been approved by the Board is inherently misleading." Pet. App. 19a. However, the Board's position plainly violates the bedrock rule that "States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203; *Fane*, 113 S. Ct. at 1800-02; *Peel*, 496 U.S. at 111; *Zauderer*, 471 U.S. at 644-49; *Bates*, 433 U.S. at 372-74.

If the Board fears that use of the CFP designation will mislead the public as to whether the specialty is state-recognized, this can be cured by a simple disclaimer. Indeed, Board generally permits disclaimers of exactly this kind for most unrecognized specialties. *See* Rule 21A-24.00(1)(g); Fla. Admin. Code § 61H1-24.001(1)(g). Yet, despite the Board's recognition that disclaimers work, and this Court's repeated rulings that the preferred remedy for potentially misleading speech is more speech rather than suppression, the Board did not even consider whether a disclaimer might alleviate the potential for confusion it has identified. Instead, the Board chose simply to ban the dissemination of expression that may be extremely useful to consumers who need estate or financial planning advice and want the assurance of accounting competence that a CPA designation provides.

The Board's ban on use of the CFP designation by CPAs thus fails to carefully calculate the cost of regulation, and must be invalidated.

CONCLUSION

The judgment of the District Court of Appeal of Florida should be reversed.

Respectfully submitted,

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